
1995 Wis Eth Bd 5
IMPROPER USE OF OFFICE; LOBBYING

Neither the Ethics Code nor lobbying law is an impediment to the production and airing of a videotape about a public official as long as the video production company can clearly and convincingly demonstrate that (1) the production is not at the behest of or initiation of the official and (2) editorial direction is independent of the official and others operating on his or her behalf, including his or her appointees and campaign committee.

Neither the Ethics Code nor lobbying law is an impediment if the funding is appropriately treated as a campaign contribution, complies with the lobbying law's timing restrictions, and is permitted and reported under Wisconsin's campaign finance laws. OEB 95-5 (July 31, 1995)

Facts

[1] This opinion is based upon these understandings:

- a. You write on behalf of a video production company.
- b. The video production company is planning a project to make a one-hour video documentary focusing on the accomplishments of a particular partisan elective state official and the State of Wisconsin during that official's tenure in office.
- c. The video production company will solicit funds from the private sector to make the video.
- d. The video production company also plans to solicit funds to purchase television air time to show the documentary and will also distribute the video to schools and libraries.
- e. Some of the businesses that may help sponsor the video may employ lobbyists.

Question

[2] The Ethics Board understands your question to be:

Do laws administered by the Ethics Board restrict the video production company's proposed project?

Discussion

[3] As a general matter, there are no provisions of the Ethics Code or lobbying law that would restrict anyone from making a documentary video about any public official, and distributing that video as it sees fit. However, the Ethics Code and lobbying law may impose restraints on a public official's participation in, or cooperation with, a project that will personally benefit that individual.

The statutes most pertinent to your inquiry are §§19.45(2), 19.45(3), and 13.625, *Wisconsin Statutes*.

Sections 19.45(2) and 19.45(3) of the Ethics Code provide:

19.45 Standards of conduct; state public officials. (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

Section 13.625 of the lobbying law provides:

13.625 Prohibited practices. (1) No lobbyist may:

* * *

(b) Furnish to any agency official or legislative employee of the state or to any elective state official or candidate for an elective state office, or to the official's, employee's or candidate's personal campaign committee:

1. Lodging.

2. Transportation.

3. Food, meals, beverages, money or any other thing of pecuniary value, except that a lobbyist may make a campaign contribution to a partisan elective state official or candidate for national, state or local office or to the official's or candidate's personal campaign committee; but a lobbyist may make a contribution to which par. (c) applies only as authorized in par. (c).

* * *

(d) Contract to receive or receive compensation dependent in any manner upon the success or failure of any legislative or administrative action.

(2) No principal may engage in the practices prohibited under sub. (1) (b) and (c). This subsection does not apply to the furnishing of transportation, lodging, food, meals, beverages or any other thing of pecuniary value which is also made available to the general public.

(3) No candidate for an elective state office, elective state official, agency official or legislative employee of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as permitted under subs. (1)(b)3 and (c), (2), (4), (5), (6), (7), (8) and (9). No personal campaign committee of a candidate for state office may accept anything of pecuniary value from a lobbyist or principal, except as permitted for such a candidate under subs. (1) (b) 3 and (c), (2) and (6).

Ethics Code Considerations

[4] Under the Ethics Code, the question is essentially whether the official's involvement in the video production company's project amounts to use of public position or office to obtain something of substantial value for private benefit.

Use of Office

[5] The Ethics Code prohibits a public official from using his or her office for personal benefit. The Ethics Board consistently has held that if an item or service is offered to an official because he or she holds a public office or position, the official's acceptance of that item or service is a use of office.

4 Op. Eth. Bd. 71 (1980). In the circumstances about which you have asked, if you make the video, independent of the official's wishes or consent, then the prohibition simply does not apply. However, if the official affirmatively

employs his or her office to realize the video's production and broadcast, that is a use of office.¹

Substantial Value

[6] The Ethics Board has said that an item or service has substantial value if it is of more than token or inconsequential value. 9 Op. Eth. Bd. 1 (1985); 7 Op. Eth. Bd. 34 (1982), 2 (1983); 5 Op. Eth. Bd. 61 (1981). "Anything of value" includes a favor or service, as well as money. §19.42(1), *Wisconsin Statutes*. Clearly, the costs involved in producing and buying air time for a video that an official would otherwise have to pay for from private funds are more than token or insubstantial. 7 Op. Eth. Bd. 1 (1983).

Private Benefit

[7] The Ethics Board has recognized that items or services that might be offered to a state public official may benefit both the public as well as the individual privately. The Board's long-established interpretation is that the law's prohibition does not apply if the item or service is accepted primarily for the state's benefit, and that any private benefit is incidental. 8 Op. Eth. Bd. 50 (1985); 6 Op. Eth. Bd. 12 (1982); 5 Op. Eth. Bd. 58 (1981); 3 Op. Eth. Bd. 105 (1980). Whether the video will be primarily of public benefit or private benefit will, of course, depend on its content. Your letter does not offer sufficient information to permit a conclusion to be drawn about the video's private benefit to the official.

[8] Therefore, the Ethics Code is not an impediment to the course of action you have asked about as long as (1) the production is not at the behest of or initiation of the official, and (2) editorial direction is independent of the official and others operating on his or her behalf, including his or her appointees and campaign committee.² Otherwise, we cannot say that the official's participation would be consistent with the Ethics Code.

Improper Influence

[9] Another consideration under the Ethics Code is the application of §19.45(3). That section prohibits any person from offering or giving anything of value to an official, either directly or indirectly, if it could reasonably be expected to influence that official. The issue raised by your question is

¹ A use of office includes using the status or prestige of office as well as use of the state's time, facilities, supplies, and services not available to the general public. *See, e.g.*, 9 Op. Eth. Bd. 45 (1987), 21 (1986); 8 Op. Eth. Bd. 61 (1985); 7 Op. Eth. Bd. 22 (1983).

² This is consistent with the Board's prior opinion that an official may not accept free video recording services to record a personal message of the official's choice for use by television stations. 7 Op. Eth. 1 (1983).

whether a private business's or organization's purchase of air time for broadcast of a video about the official's accomplishments can reasonably be said to be providing something of value to that official. There may be instances in which an organization may properly be said to give something to a government official even in an instance in which the official is not empowered to refuse or stop the donor's action. Even so, we are persuaded that the content and conveyance of private speech, made independent of and not in concert with, or at the request or suggestion of, an official, is not an evil restrained by Wisconsin's Ethics Code.³

Lobbying Law Considerations

[10] The lobbying law generally prohibits a business or organization that employs a lobbyist (a "lobbying principal") from furnishing anything of pecuniary value to a state official. It also prohibits the official from soliciting or accepting anything of pecuniary value from such principal. The key question in the circumstances about which you have asked is whether the official would be *accepting* something of pecuniary value from a lobbying principal if a principal were to furnish funds to the video production company to produce and air the proposed video.

[11] The analysis under the lobbying law is somewhat similar to that under the Ethics Code; that is, the question is whether the video production company's offer to produce and air the video can be said to be something that the elected official has accepted and whether the video production company's effort produces a private pecuniary benefit for the official.

[12] If the video is made at the behest of the official, under his or her direction or control, direct or indirect, or subject to his or her editorial approval, then it would appear that the official would be actively accepting items and services of pecuniary value. In contrast, if the video were produced and aired without the official's agreement, the official could not be said to have accepted anything. If the former is the case, a principal that underwrote the cost of production or air time would be furnishing a pecuniary benefit to the official. Therefore, our advice is that businesses and organizations that are paying individuals to try to influence the direction of state law should not contribute financially to the video production company's production and dissemination of a video about the official unless it can clearly and convincingly be demonstrated that the venture was conceived and undertaken independent of the official, his or her appointees, and campaign committee and without their editorial direction or control.

³ Cf. §11.06(7), *Wisconsin Statutes*.

[13] Of course, neither the Ethics Code nor lobbying law is an impediment if the funding is appropriately treated as a campaign contribution, complies with the lobbying law's timing restrictions, and is permitted and reported under Wisconsin's campaign finance laws.⁴

Advice

[14] The Ethics Board advises that neither the Ethics Code nor lobbying law is an impediment to the production and airing of a videotape about a public official as long as the video production company can clearly and convincingly demonstrate that (1) the production is not at the behest of or initiation of the official and (2) editorial direction is independent of the official and others operating on his or her behalf, including his or her appointees and campaign committee.

[15] Neither the Ethics Code nor lobbying law is an impediment if the funding is appropriately treated as a campaign contribution, complies with the lobbying law's timing restrictions, and is permitted and reported under Wisconsin's campaign finance laws.

⁴ Campaign contributions permitted and reported under Ch.11, *Wisconsin Statutes*, are exempt from the restrictions of the Ethics Code. It is our understanding that if the video advocates the election or defeat of a clearly identified candidate then contributions to the costs of production or purchase of air time would be considered campaign contributions. If this were the case, then you could make the video and air it without restriction from the Ethics Code. If a business or organization that employs a lobbyist were a contributor, then the lobbying law's restrictions on the timing of campaign contributions would apply.